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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

UNLIMITED JURISDICTION

BY FAX

E. VAN CULLENS,

Plaintiff,

v.

JOHN DOE,

Defendant.

No. CV 814664

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO QUASH SUBPOENA

C.C.P. §418.10

Date: April 17, 2003
Time: 9:00 a.m.
Dept.: 2, Hon. William J. Elfving

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I. INTRODUCTION

> People should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

Columbia Insurance Company v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (discussing First Amendment limitations on allowing discovery to reveal an anonymous defendant's identity). Movant John Doe[1] is an anonymous poster to two Internet message boards who made two statements critical of a publicly-traded company currently run by Plaintiff Cullens. In an effort to prevent Doe from further posting his opinions about the company on the Internet, Cullens has filed a manifestly meritless libel suit against Doe in Illinois and now asks this California court to force disclosure of his identity.

Doe brings two motions in response, one to quash the subpoena and a second, a special motion to strike under California's Anti-SLAPP statute. Both seek to protect Doe's First Amendment right to speak anonymously on the Internet. Since both motions draw on the same factual and legal backgrounds and the same portions of Illinois defamation law, we will only provide them once in this Motion to Quash (and not in the Motion to Strike) in order to avoid repetition and save paper.

II. FACTUAL BACKGROUND

A. The Parties

Plaintiff Cullens is President and Chief Executive Officer of Westell, an Illinois company. Cullens has sued Doe in Illinois state court alleging one cause of action for libel per se. E. Van Cullens v. John Doe, No. 2003L000111 (18th Judicial Circuit, Du Page County, Illinois). A true and correct copy of the Complaint is attached to the Declaration of Cindy A. Cohn file herewith as Exhibit A (Cohn. Decl.).[2] Cullens has issued a California subpoena to online service provider Yahoo! Inc. ("Yahoo") seeking to have Yahoo reveal the identity and all other information Yahoo

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[1] Plaintiff refers to Defendant as John Doe. Doe here adopts that moniker but this is not intended to be a representation of Defendant's actual gender.

[2] On March 17, 2003, the Illinois Court issued an extension of time until May 12, 2003, for Doe to respond to the Illinois lawsuit in order to allow this Court time to consider this Motion to Quash and for Cullens to substantiate his claim of $50,000 in damages.

has about John Doe. Cohn. Decl., Exh. B.[3] The lawsuit arises from two postings Doe made in two discussions held on Yahoo message boards.

B. Yahoo's Message Boards on the Internet

The United States Supreme Court has repeatedly recognized the Internet's potential to support democratic institutions and serve as the ideal "town square." The Internet allows people otherwise without access to significant resources to voice their opinions – profound, profane, or proselytizing though they may be – to all who wish to read them. As the Supreme Court explained in Reno v. American Civil Liberties Union, 521 U.S. 844, 853 (1997), "[f]rom the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, the same individual can become a pamphleteer." Id. at 870.

So that these town criers and pamphleteers and their interested audiences can find each other, Yahoo! has created electronic bulletin boards, or "Message Boards," covering a variety of topics. A message board exists for every publicly-traded company in the U.S. These message boards permit any user to post comments and opinions and read the postings of others. To sign up for a message board, a person need give Yahoo! only her birthday, zip code, gender and an alternate e-mail address. But the poster is free to post messages under any moniker.

Anonymity on these message boards facilitates free expression, particularly where controversial topics are discussed. Anonymity, by shielding the writer from those who might take issue with her comments, encourages free-flowing conversations on these message boards and fosters a dialogue that includes a wide range of sometimes heated exchanges, encompassing the informed, the opinionated, the speculative, the caustic, and the invective. Indeed, although nothing prevents an individual from using her real name, most people choose to post messages under a pseudonym.

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[3] Note that the subpoena seeks identifying information about Doe plus "any and all records of any type whatsoever relating, referring, concerning or identifying" Doe. Subpoena at ¶8.

One aspect of the message board that makes it very different from almost any other form of published expression is that any person who disagrees with something that is said on a message board for any reason – including the belief that a statement contains false or misleading information about herself – can respond to the statement immediately, at little or no cost, and that response will have the same prominence as the offending message.

C. **The Westell and ADCT Message Boards**

Doe here posted one message on the Yahoo Westell message board and one on the Yahoo message board devoted to ADC Telecommunications ("ADCT"). The opening message on the Westell and ADCT message boards each explains the ground rules for discussion. The Westell board says:

> This is the Yahoo! Message Board about Westell (Nasdaq: WSTL), where you can discuss the future prospects of the company and share information about it with others. This board is not connected in any way with the company, and any messages are solely the opinion and responsibility of the poster.

Every page of message listings on both boards is accompanied by a similar warning that all messages should be treated as the opinions of the poster:

> Reminder: This board is not connected with the company. These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose.

Many members of the public regularly contribute to the Yahoo message boards to discuss the companies. As of the date this brief is filed, over 39183 messages have been posted on the Westell board and over 69596 messages have been posted on the ADCT board. These speakers address an enormous variety of topics. Investors and members of the public discuss the latest news about what products the companies have sold and may sell, what new products it may develop, what the strengths and weaknesses of the companies' operations are, what competitors are doing and what managers and employees might do better. Many of the messages praise the company, many criticize it, and some are neutral. The posters frequently correct, upbraid, insult and praise *each other* as well.

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D. Doe's Participation In The Public Discussion On The Westell and ADCT Message Boards

The two messages at issue in this case are both dated January 15, 2003. On the Westell Board Doe posted, in a message with the subject line "WSTL's crooked management":

> You guys are dreaming . . . Have you forgotten the multi-million dollar lawsuits that are still pending against WSTL when former CEO Zionts orchestrated a cook-the-book scheme. Obviously you guys weren't on board then. You simply can't trust the management of this company. Put your money in ADCT and you'll do okay.

On the ADCT Board Doe posted with the subject line "Look at WSTL":

> WSTL sucks. Their management is crooked. Multi-million dollar lawsuits pending from Enron-like management of Marc Zionts. STAY AWAY from this loser

Cohn. Decl., Exh. A, pp. 7-8. Plaintiff Cullens is not identified in either message. The messages refer only generically to Westell's "management." The only individual mentioned is Westell's former CEO, Marc Zionts. The lawsuits to which Doe refers were real; then-pending shareholder class action lawsuits based upon a claim of mismanagement: In re Westell Technologies, Inc., Securities Lit No. 00C6735 (N.D. Ill.) and Dollens v. Vukovich and Zionts, No. 01C2826 (N.D. Ill.).[4]

Cullens did not attempt to rebut Doe's statements on the Yahoo board. He made no attempt to explain that current management was trustworthy or explain why the lawsuits were unfounded. Instead, he simply filed a personal lawsuit replete with conclusory allegations that these statements were defamatory per se as to him as an individual and have caused him "damage and injury to his reputation" in excess of $50,000. Cohn. Decl., Exh. A, page 5.

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[4] Westell itself described the lawsuits as alleging that defendants made "false and misleading statements in 2000 regarding forecasts for the second quarter of 2001." On February 20, 2003, long after Doe's postings, Westell issued a press release announcing that it paid $3.95 million to settle the case along with adopting "certain governance and communications procedures." <http://makeashorterlink.com/?R58F132C3>. *See e.g.* Cohn. Decl., Exh. C (preliminary decisions in both cases).

III. LEGAL BACKGROUND

A. The First Amendment Establishes The Right To Speak Anonymously In Chat Rooms And On Message Boards On The Internet

The U.S. Supreme Court has repeatedly upheld, in diverse contexts, the First Amendment right to speak anonymously.[5] The California Supreme Court too has acknowledged the constitutional right to speak and associate anonymously based on both the liberty of speech and privacy provisions of the California Constitution. Britt v. Superior Court, 20 Cal.3d 844, 852-57 (1978).

These protections have been extended to anonymous speech online. "The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." Doe v. 2TheMart.com, Inc., 140 F.Supp.2d 1088, 1093 (W.D. Wash. 2001). Accord Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999). A less protective approach would allow lawsuits that have little merit, like the present one, to be used solely for the purpose of piercing the veil of anonymity. Indeed, "[t]he primary purpose of many of these suits is not to pursue a defamation cause of action, however, but to reveal the identity of the poster and quiet criticism." Joshua R. Furman, Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic

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[5] See Watchtower Bible and Tract Society v. Village of Staton, 122 S.Ct. 2080, 2089 (2002) ("The decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible"); Buckley v. American Constitutional Law Found., Inc., 525 U.S. 182, 199 (1999) (holding that statute requiring, inter alia, that initiative-petition circulators wear name badges violates First Amendment); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (holding that anonymous pamphleteering is "an honorable tradition of advocacy and of dissent" and that anonymity is "a shield from the tyranny of the majority"); Talley v. California, 362 U.S. 60, 64-65 (1960) (holding anonymity protected under the First Amendment because forced "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance"); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-61, 463 (1958) (describing how the fear of retribution exerts a powerful chilling effect on one's ability to exercise her First Amendment rights).

Lawsuits Against Public Participation, 25 Seattle U. L. Rev. 213, 217 (2001). Courts have set tough standards by which to evaluate subpoenas that compel production of anonymous Internet speakers' identities, to ensure first amendment rights are not abrogated.

B. Does' Motion to Quash Should Be Granted Because there Is No Compelling Need for Defendant's Identity that Outweighs Defendant's First Amendment Rights

To insure that Doe's First Amendment rights are adequately protected, a subpoena issued under the authority of this Court that might strip a speaker of anonymity triggers exacting constitutional scrutiny. Rancho Publications v. Superior Court, 68 Cal.App.4th 1538, 1547-51, 81 Cal.Rptr.2d 274, 276-78 (1999) (quashing a subpoena that sought the names of anonymous advertisers who had criticized a community hospital). Specifically, the need for the discovery of Doe's identity must be balanced against the magnitude of the privacy invasion. See id. at 1549.

A well-reasoned, rigorous test has been adopted by other courts around the country that have confronted the issue of anonymous online speech in recent years. Although the law in this relatively new area is still coalescing, courts have consistently concluded that First Amendment principles are best protected by setting heavy burdens upon litigants who seek to use the court's subpoena power to compel production of anonymous speakers' identities. A recent federal decision determined that allowing such a subpoena to stand is only appropriate in the "exceptional case" where a "compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker." Doe v. 2themart.com, 140 F.Supp.2d 1088, 1095 (W.D. Wash 2001) (emphasis added) (citing Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999); Immunomedics, Inc. v. Doe, 775 A.2d 773 (N.J. Sup. Ct. App. Div. 2001) (affirming motion to quash). Cohn. Decl., Exh. D.

A compelling need for the information does not exist where the underlying litigation is weak. See Dendrite International, Inc. v. Doe, No. 3, 775 A.2d 756, 760 (N.J. App. 2001) 760 ("the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented"). Cohn. Decl., Exh. E. In such cases, the risk is high that the underlying litigation serves only as a tool for the disclosure of the Doe's identity. See Missouri ex rel. Classic III Inc. v. Ely, 954 S.W.2d 650, 659 (Mo. App. 1997) ("If the case is weak,

then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names.") Cohn. Decl., Exh. F.

The seminal case setting forth First Amendment restrictions upon a plaintiff's ability to compel an ISP to reveal an anonymous defendant's identity is Dendrite. Cohn. Decl., Exh. E. In Dendrite, Dendrite formally sued four anonymous posters on the Yahoo message board relating to Dendrite, alleging that some were current or former employees who had violated confidentiality agreements, and that some had defamed the company. Two of the Does moved to quash the subpoena. Recognizing "the well-established First Amendment right to speak anonymously," the New Jersey appellate court imposed a heavy burden on any plaintiff seeking to reveal the identity of anonymous defendants:

> We hold that . . . the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena. . . .These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.
>
> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech. The complaint and all information provided to the court should be carefully reviewed to determine whether the plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted . . . the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

Id. at 760-61 (emphasis added).

Applying these multiple safeguards to protect First Amendment rights, the Dendrite court carefully examined the complained-of statements and concluded that Dendrite "failed to provide this Court with ample proof from which to conclude that John Does 3 and 4 have used their constitutional protections in order to conduct themselves in a manner which is unlawful or that would warrant this Court to revoke their constitutional protections." Id. at 764.

Similarly, in a case recently decided in Federal District Court in San Jose, Judge Alsop, after reviewing the relevant caselaw, required the following: (1) that prior to seeking assistance from the court, it made a diligent effort to obtain the desired information by other means; and (2) that the offending statements are actionable; and (3) that the statements have in fact caused the company actual damage." In re Discovery Order Issued by the Superior Court, Province of Quebec, District of Montreal, Canada, case no. 02-0151-MISC-WHA at 5:16-18 (hereinafter "Nymox"). Cohn. Decl., Exh. F.

C. Cullens Cannot Demonstrate That He Has A Compelling Interest in Obtaining Doe's Identity That Outweighs Doe's First Amendment Right to Speak Anonymously

It is clear that when this test is applied, Cullens has not made, and cannot make, an adequate showing that his need to know Doe's identity outweighs Doe's First Amendment rights. Cullens's cannot demonstrate a compelling need to learn Doe's identity because his cause of action for libel per se is obviously without merit for several reasons.

1 Libel Actions Under Illinois Law are Strictly Limited by the First Amendment and the Illinois Constitution

All actions based on the dissemination of injurious falsehoods are strictly limited by the First Amendment to the U.S. Constitution, and are also limited by the parallel provisions in the state constitutions. New York Times v. Sullivan, 376 U.S. 254 (1964). The free speech provision in the Illinois Constitution, article 1, section 4, is in some contexts interpreted as providing even more protection for speakers than the First Amendment. State v. DiGuida, 152 Ill.2d 104, 122 (1992). Cohn. Decl., Exh. G.

It is obvious, however, in this case that the Complaint is defective and the action has little likelihood of success under even common law principles.

2. Cullens's Lawsuit is Obviously Without Merit because the Statement was not "of and Concerning" Cullens and May Reasonably be Given an Innocent, Nondefamatory Construction

In Illinois, a statement is considered libelous if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with him. Bryson v. News America Publications, 74 Ill.2d 77, 87 (1996). Cohn.

Decl., Exh. H. A statement is libelous per se, that is libelous on its face, if, among other factors, it imputes the commission of a criminal offense to the plaintiff or imputes the lack of ability or integrity of the plaintiff in the performance of his or her professional duties. Id. at 88. Such statements are so obviously and materially harmful to the plaintiff that no proof of actual injury is required. Id. at 87.

However, the statement must be "of and concerning" the plaintiff. Schivarelli v. CBS, Inc., 333 Ill.App.3d 755, 765 (2002); Aroonsakul v. Shannon, 279 Ill.App.3d 345, 350 (1996) ; Schaffer v. Zekman, 196 Ill.App.3d 727, 732 (1990).[6] Cohn. Decl., Exhs. I, J, K, That is the statement must be identifiably about the plaintiff. Schivarelli, 333 Ill.App.3d at 765. Statements that do not identify the plaintiff by name are not libelous to the plaintiff unless, as a matter of law, the statement is capable of being reasonably understood by a third party as referring to the plaintiff. Aroonsakul, 279 Ill.App.3d at 350. It is not enough that the plaintiff believes the statements were about him; it must be alleged that others actually believed the statements were about him. Archibald v. Belleville News Democrat, 54 Ill.App.2d 38, 42 (1964). Cohn. Decl., Exh. L. Thus in Schivarelli, the action was dismissed because it was not obvious from the report that the allegedly libelous statements pertained to the plaintiff businesses. Schivarelli, 333 Ill.App.3d at 765-66. And in Schaffer, a toxicologist at the medical examiner's office was not permitted to maintain a libel action arising from a report that alleged mishandling by the medical examiner's office despite the fact that he was interviewed in the report and depicted while the allegedly libelous statements were broadcast. 196 Ill.App.3d at 732.

Illinois also recognizes a modified form of the common law "innocent construction rule." Chapski v. Copley Press, 92 Ill.2d 344, 352 (1982). Cohn. Decl., Exh. M. Under this rule, a plaintiff may not maintain a libel per se action if the statement, when considered in context, may reasonably be interpreted as "referring to someone other than the plaintiff." Id.; Homerin v. Mid-Illinois Newspapers, 245 Ill.App.3d 402, 405 (1993). Cohn. Decl., Exh. N. The rule bars a libel per se action if such an innocent construction is reasonable; it does not matter that there may be

[6] The "of and concerning" requirement is also of constitutional dimension. New York Times v. Sullivan, 376 U.S. at 288-89.

other constructions that are equally or more reasonable under which liability could attach. Mittleman v. Witous, 135 Ill.2d 220, 231 (1989).

The innocent construction rule has been used to prohibit libel per se actions in situations far less "innocent" than the one plead in the Complaint in this action. In Homerin, the court dismissed the libel per se action based on the publication of a political cartoon that caricatured, but did not otherwise identify, the plaintiff because the plaintiff had failed to allege that readers of the publication reasonably understood the cartoon to refer to him. 245 Ill.App.3d at 405. In Grisanzio v. Rockford Newspapers, 132 Ill.App.3d 914, 919 (1985) (Cohn. Decl., Exh. P), the article referred to a restaurant where illegal activity took place but did not refer to the owner of the restaurant by name. In fact the article specifically named the persons who were committing the allegedly illegal acts. The court applied the innocent construction rule to bar the restaurant owner's libel per se action. Id. And in Barry Harlem Corp. v. Kraff, 273 Ill.App.3d 388, 390-91 (1995) (Cohn. Decl., Exh. Q), the court applied the rule to bar an action based on statements that referred to advertisements for a medical procedure even though the plaintiff was the only practitioner of that procedure who advertised.

The Illinois Court of Appeal's decision in Cartwright v. Garrison, 113 Ill.App.3d 536 (1983) (Cohn. Decl., Exh. R), is directly on point. In Cartwright, the court found that a school district superintendent could not maintain a libel per se action against the publisher of an article that alleged misdeeds by the school "administration." The court found that the article could be reasonably read to refer to other administrators besides the plaintiff and thus the plaintiff superintendent could not maintain a defamation action. Id. at 541

Indeed, Cullens's Complaint against Doe is defective under both of these common law requirements. The statements were clearly not "of and concerning" Cullens. Doe's statements about Westell's "management" are clearly analogous to the statements about the "administration" made in Cartwright. These statements could be reasonably read to refer to other managers, say, for example, Zionts, the one Doe specifically names, and not Cullens. Indeed, the *only* reasonable reading of the statements in context is that they refer to Zionts and the management in place at the time of his misdeeds. Cullens does not plead in the Complaint that others reasonably believed the

statements to pertain to him personally. Even if he did, such an allegation cannot be maintained as a matter of law.

3. Cullens's Lawsuit Against Doe is Obviously Without Merit Because Doe's Statements Are Privileged under Illinois Law

An additional common law principle also severely limits the libel per se action as pled. Illinois has adopted the privilege for reports of official proceedings found in Restatement (Second) of Torts §611. Catalano v. Pechous, 83 Ill.3d 146 (1980). Cohn. Decl., Exh. S. This privilege provides that those who report fairly and accurately on judicial proceedings enjoy a qualified immunity from liability. Tepper v. Copley Press, 308 Ill.App.3d 718 (1999) (Cohn. Decl., Exh. T); Newell v. Field Enterprises, 91 Ill.3d 735 (1980). Cohn. Decl., Exh. U. This is exactly what Doe was doing: reporting to the message boards on the shareholder actions filed against Westell's management. Thus, Cullens will have to demonstrate that the defendant published the statements with the specific intent to harm Cullens's, not the company's, reputation in order to prevail. He will not be able to do so.

4. Cullens's Lawsuit Against Doe is Obviously Without Merit Because Doe's Statements Are Rhetorical and Do Not Imply the Existence of a Provably False Fact

Furthermore, Cullens's action against Doe cannot succeed because Doe's statements about Westell's "management" were not actionable factual statements. Rather they are statements of pure opinion, the factual bases for which are disclosed within the same communication. No action for libel can be based on such statements under Illinois law.

Under Illinois law, a statement of opinion is not defamatory "unless the opinion implies the existence of undisclosed facts or discloses incorrect or incomplete facts." Moriarty v. Greene, 315 Ill.App.3d 225, 234 (2000) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)). There are several reasons why Doe's statements are not actionable under this standard. Cohn. Decl., Exh. V.

First, Doe disclosed the factual basis for his conclusions that Westell's management was "crooked" and "cannot be trusted." It is clear from his statements that he bases his conclusions on the revealed facts regarding the performance of Westell's previous CEO Zionts and the shareholder

lawsuits that resulted from his actions. In such situations, the readers are "free to accept or reject the author's opinion based on their own independent evaluation of the facts." In re Yagman, 55 F.3d 1430, 1439 (9th Cir. 1995). See also Dodds v. ABC, Inc., 145 F.3d 1053, 1067-68 (9th Cir. 1998); Phantom Touring, Inc. v. Affiliated Productions, 953 F.2d 724, 730-31 & n.13 (1st Cir. 1992) (characterizing such statements as "pure opinion").

Second, the characterizations of Westell's management as being "crooked" and "not to be trusted" made in the context of the Yahoo! message boards are clearly the kinds of rhetorical hyperbole that cannot as a matter of law be defamatory. If Cullens is able to clear each of the hurdles already described above, an Illinois court will apply a three part test to determine whether or not Doe's statements reasonably implies the existence of a provably false fact. Hopewell v. Vitullo, 299 Ill.App.3d 513, 518-19 (1998). Cohn. Decl., Exh. W. First the court will "consider whether the language of the statement has a precise and readily understood meaning, while bearing in mind that the first amendment protects overly loose, figurative, rhetorical, or hyperbolic language, which negates the impression that the statement actually presents facts." Id. Second, the court will consider "whether the general tenor of the context in which the statement appears negated the impression that the statement has factual content." Id. Third, the court will consider "whether the statement is susceptible of being objectively verified as true or false." Id.

Applying this test the Hopewell court concluded that the statement "fired because of his incompetence" was nonactionable opinion. The fact of Hopewell's firing was not disputed. The court acknowledged that the term "incompetence," although easily understood, was nevertheless so broad in scope and lacking in detail that it did not have a precise and readily understood meaning such that it could be defamatory. "There are numerous reasons why one might conclude that another is incompetent; one person's idea of when one reaches the threshold of incompetence will vary from the next person's. Without the context and content of the statement to limit the scope of 'incompetent,' we cannot say that there is a precise meaning relating to the alleged defamatory statement." Id. at 519-20.

The word "crook," a form of which is at issue here, was found by another Illinois appellate court to suffer from the same imprecision as "incompetence." Dubinsky v. United Arlines Master

Executive Council, 303 Ill.App.3d 317, 329-30 (1999). Cohn. Decl., Exh. X. "Richards' statement that Dubinsky was a 'crook' was not actionable because it was not made in any specific factual context. One cannot rely on an assumption that those who heard the statement were completely apprised of all the developments in the controversy so as to create a definitive factual context for use of the word 'crook.'" Id. See also Schivarelli, at 762 (2002) (holding that the statement accusing the plaintiff of "cheating the city" was nonactionable opinion). Cohn Decl., Exh. I.

When the test is applied to Doe's statements, it is obvious that a court will reach the same decision. The phrases "crooked" and "not to be trusted" are the type of rhetorical language that the First Amendment was designed to shield from liability. They do not imply the existence of any specific facts. Rather, like "incompetence" and "crook," they are so broad in their meanings that they could encompass a whole range of subjective beliefs. Furthermore, applying the third part of the Illinois test, the terms are not objective, provably false terms.

The second prong of the Illinois test bears special attention. The general tenor of the Yahoo! message boards is one of fiery and invective rhetoric, not reasoned factual exposition. Indeed, many forums in which publicly-trade stocks are casually discussed are similarly inherently subjective. In such situations, courts place a heavy burden on the plaintiff to prove that the statements are actionable. See Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998) (holding that the context and tone of stock tips indicated that article contained constitutionally protected subjective views, not factual statements giving rise to defamation liability); Morningstar, Inc. v. Superior Court, 23 Cal.App.4th 676, 693 (1994) (holding that plaintiff could not state a cause of action for libel or interference with prospective economic advantage based on loose, figurative, or hyperbolic language in commentary about a mutual fund); accord Greenbelt Publishing Association v. Bresler, 398 U.S. 6, 14 (1970) ("even the most careless reader must have perceived that the word ["blackmail"] was no more than rhetorical hyperbole, a vigorous epithet.").

Internet message boards have a well-established reputation for being for a for fiery and figurative rhetoric rather than objective facts. In Nymox, the Doe accused corporate management of deliberately falsely claiming that a rival company "has been killing human volunteers during the course of this study by injecting them with HIV." Nymox at 5:26-6:6. Cohn Decl., Exh. F. The

court acknowledged that if the messages were false they were defamatory per se. Still it noted: "The context, as well as the content, of the statement must be considered. The statement was posted anonymously on an Internet message board. The tenor of the submitted postings would lead the ordinary reader to regard their contents skeptically." Id. at 6:18-20. And in Global Telemedia Int'l, Inc. v. Doe 1, 132 F.Supp.2d 1261 (C.D. Cal. 2001), which considered allegedly defamatory statements posted anonymously to a financial message board, the court observed that "to put it mildly, these postings . . lack the formality and polish typically found in documents in which a reader would expect to find facts."[7] Id. at 1267. The Court emphasized that the posters "use[d] exaggeration, figurative speech and broad generalities" and that "[t]he reasonable reader looking at the hundreds and thousands of postings about the company from a wide variety of posters, would not expect that [the poster] was airing anything other than his personal views of the company and its prospects." Id. at 1268. Based on this context, the court reasoned that "while [the poster's] sentiments are not positive, the statement contains exaggerated speech and broad generalities, all indicia of opinion. Given the tone, a reasonable reader would not think the poster was stating facts about the company, but rather expressing displeasure with the way the company is run." Id. at 1270. The court concluded the statements were protected opinion and dismissed the lawsuit with prejudice under California's anti-SLAPP statute. See id. at 1271.

Indeed, the Yahoo message boards expressly warn that "[t]hese messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose." Such a disclaimer has been cited as a basis for denying a cause of action for defamation against an adverse financial rating. See Jefferson County School District v.

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[7] The postings that the Global Telemedia court reviewed demonstrate the broad range of expression that has been protected in the context of a message board:

- "you have been screwed out of your hard earned money here its time to talk about a lawsuit"
- "I have never witnessed such blatant mis-management, these people hold our money and they dictate after they lie how it will be used.....greatest joke on the boards."

Id. at 1268-69.

Moody's Investor's Services, Inc., 988 F. Supp. 1341, 1345 (D. Colo. 1997).

Thus even if Doe had misstated any facts about the lawsuit or the company's operations, the misstatements were unlikely to be taken as truthful given the nature of Yahoo message boards. The notion that most members of the public would treat the average message board posting as a reliable statement of fact on which to base major investment decisions, or to form an opinion about the officers of a major company, is almost laughable; that is certainly true of the repartee in which many of the posters on message boards tend to be engaged.

IV. CONCLUSION

If the John and Jane Does of the Internet are not afforded First Amendment protection, the threat of their identities being revealed will impose a devastatingly chilling effect on speakers of modest means and little understanding of the law. The result will be that comparatively wealthy corporations and their management will be able to use the subpoena power of the court as a tool for silencing their critics. Faced with losing their anonymity, millions of "speakers" and "critics" on the Internet will no longer participate in public message boards because of the risk that they will lose their anonymity.

Because Cullens cannot shown a compelling interest in obtaining Doe' identities, and cannot demonstrate that any such interest outweighs Doe' First Amendment right to speak anonymously, the Motion to Quash the subpoena should be granted.

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By _____

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